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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

BENJAMIN JAMES SOHN,

Defendant and Appellant.

C090282

(Super. Ct. No. 62163120)

Appointed counsel for defendant Benjamin James Sohn filed an opening brief that sets forth the facts of the case and asks this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) After examining the record, it appears the trial court inadvertently failed to dismiss the remaining charges after accepting defendant's no contest plea to a single count. We shall modify the judgment to dismiss the remaining counts. We find no other arguable

error that would result in a disposition more favorable to defendant and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2018, defendant was charged with unlawful sexual intercourse (Pen. Code, § 261.5, subd. (d), count one),¹ committing a lewd act upon a child (§ 288, subd. (c)(1), count two), oral copulation of a person under 16 years old (§ 288A, subd. (b)(2), count three), and sodomy of a person under 16 years old (§ 286, subd. (b)(2), count four).

In February 2019, defendant pleaded no contest to count two in exchange for three years formal probation and a lifetime registration under section 290. The court conditionally accepted the plea, conditionally found him guilty of count two subject to the court accepting the plea at the time of judgment and sentencing, and also took the People's motion to dismiss any remaining charges under consideration to the time of judgment and sentencing. The parties stipulated to the police report as the factual basis of the plea. According to the police report, defendant, who was 31 years old, contacted the 15-year old victim using the social media application Grindr for the purpose of having sexual relations. He engaged in vaginal intercourse, anal intercourse, and oral copulation with the victim even after she informed him of her age.

At the sentencing hearing in March 2019, the court accepted the plea, suspended imposition of sentence, and placed defendant on three years formal probation with various terms and conditions. The court awarded custody and conduct credits, and also imposed various fees and fines without objection. Although the trial court indicated during the change of plea hearing that it would address the prosecutor's motion to dismiss the remaining charges at sentencing, neither the trial court nor the parties referenced dismissal of the remaining charges during the sentencing hearing.

¹ Further undesignated statutory references are to the Penal Code.

In April 2019, the Placer County Probation Department filed a petition for revocation of probation alleging defendant violated numerous terms and conditions of his probation, specifically that he had several social media and dating applications installed on his phone and had profiles or advertisements on those social media sites, which he was using to meet individuals to engage in sexual activity--the same method he used to contact the minor victim. At a violation of probation hearing in August 2019, defendant admitted all 17 allegations in the petition and the court revoked probation. Following the admissions, defense counsel requested the trial court reinstate probation. The prosecutor argued that the upper term of imprisonment was appropriate given defendant's underlying offense and the predatory sexual nature of his numerous probation violations using social media hookup sites, which the prosecutor recounted at length for the court. After considering the arguments of counsel as well as the probation report, the court terminated probation and sentenced defendant to the upper term of three years in state prison. Defendant timely appealed.

DISCUSSION

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief setting forth the facts of the case and requesting that this court review the record to determine whether there are any arguable issues on appeal. (*People v. Wende, supra*, 25 Cal.3d 436.) Defendant was advised of his right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days elapsed, and we received no communication from defendant.

After examining the record, we have discovered a clerical error in the judgment. Although dismissal of the remaining counts apparently was contemplated by the parties as part of the plea agreement, the trial court inadvertently failed to discuss or otherwise address dismissal of counts one, three, and four when it finally accepted the conditional plea agreement during the sentencing hearing. Statements in the reporters' transcript by

the court reflect these terms as does the abstract of judgment, which references defendant's no contest plea to count two but no plea for any other counts.

As the "court may not proceed as to the plea other than as specified in the [approved] plea" (§ 1192.5), it follows that the trial court's silence at the sentencing hearing regarding the dismissal of the remaining counts was not an exercise of judicial discretion but, rather, a clerical mistake in creating a record of the judgment. (*In re Candelario* (1970) 3 Cal.3d 702, 705.) Accordingly, we will modify the judgment to reflect the dismissal of counts one, three, and four as contemplated by the parties. Because the abstract of judgment already properly reflects defendant's no contest plea to count two and no other counts, the abstract of judgment need not be amended. We find no other arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is modified to dismiss counts one, three, and four. As so modified the judgment is affirmed.

HULL, Acting P. J.

We concur:

DUARTE, J.

RENNER, J.